UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Soaring Eagle Casino and Resort, an Enterprise of the Saginaw Chippewa Indian Tribe of Michigan,	)	
Petitioner/Cross-Respondent,	)	Case Nos. 14-2405 (Lead Case) 14-2558 (Cross Appeal)
v.	)	
National Labor Relations Board,	)	
Respondent/Cross-Petitioner.	)	

Unopposed Motion of Petitioner Soaring Eagle Casino and Resort to Stay Issuance of the Mandate

Introduction

Petitioner Soaring Eagle Casino and Resort, an enterprise of the Saginaw Chippewa Indian Tribe of Michigan, moves this Court to stay issuance of the mandate under Fed. R. Civ. P. 41(d)(2) and 6 Cir. R. 41(a) and (b), pending the Tribe's timely petition for a writ of certiorari. A stay in this case is warranted. The panel's decision conflicts with the United States Supreme Court's precedent and expands a split with the United States Court of Appeals for the Tenth Circuit, raising a substantial question regarding the applicability of the National Labor Relations Act ("the NLRA" or "the Act") to federally recognized Indian tribes. Furthermore, enforcement of the *Soaring Eagle* panel's judgment pending the Tribe's petition will irreparably harm the Tribe by significantly impairing the

exercise of its treaty and inherent sovereign rights and by impairing its ability to secure revenue for its public services without the prospect of an adequate monetary remedy. Respondent National Labor Relations Board does not oppose this motion.

Relevant Procedural History

This case, originally filed with the National Labor Relations Board, involves a challenge to the Tribe's no-solicitation employment policy and the Tribe's enforcement of that policy against an employee that repeatedly violated it.[1] Despite the Tribe's argument to the contrary, an Administrative Law Judge ("the ALJ") concluded that the NLRA vested the Board with jurisdiction over the Tribe and further concluded that the Tribe's no-solicitation employment policy and disciplinary actions violated the NLRA.[2] The ALJ recommended that the Tribe be ordered to, among other things, cease and desist maintenance and enforcement of its no-solicitation employment policy and reinstate the terminated employee.[3]

The Board adopted the ALJ's recommended order with minor modifications, and the Tribe petitioned for further review by this Court.[4] This Court vacated the Board's order and remanded the matter, in light of the Supreme Court's decision in *NLRB v. Noel Canning*, holding that certain of the President's appointments to the

[1] *See Soaring Eagle Casino & Resort v. NLRB*, Nos. 14-2405 and 14-2558, slip op. 5 (6th Cir. July 1, 2015)
[2] *Id.* at 5–6.
[3] *Id.* at 6.
[4] *Id.*

Board were unconstitutional.[5] The reconstituted Board again adopted the ALJ's recommended order with minor modifications, and the Tribe again petitioned for this Court's review.[6]

On July 1, 2015, the panel entered judgment enforcing of the Board's order.[7] In so doing, the panel followed, but criticized, a prior published decision of another panel, that had decided a similar issue three weeks prior.[8] The panel in this case articulated, in no uncertain terms, its disagreement that the NLRA vests the Board with jurisdiction over the Tribe and its belief that the three-week-old decision it followed was contrary to controlling law.[9] On August 29, 2015, the Tribe moved this Court for rehearing en banc.[10] On September 29, 2015, the panel denied a rehearing[11] and this Court denied a rehearing en banc.[12] The Tribe now moves this Court to stay issuance of the mandate under Fed. R. App. P. 41(d)(2)(A) and 6 Cir. R. 41(a). The motion is timely under 6 Cir. R. 41(b).

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[5] *Id.* at 6–7.
[6] *Id.* at 7.
[7] *Id.* at 1, 34.
[8] *Id.* at 16–23.
[9] *Id.*
[10] Petition for Rehearing En Banc *Soaring Eagle Casino & Resort v. NLRB*, Nos. 14-2405 and 14-2558 (Aug. 24, 2015).
[11] *See* 6 Cir. I.O.P. 35(d)(1) ("The court will treat a petition for rehearing en banc as a petition for rehearing before the original panel.").
[12] *Soaring Eagle Casino & Resort v. NLRB*, Nos. 14-2405 and 14-2558 (Sept. 29, 2015) (order).

Argument

A motion to stay issuance of a mandate "must show that the certiorari petition would present a substantial question and that there is good cause for a stay."[13] Here, both elements are met. First, the panel's decision conflicts with Supreme Court precedent, undermining long-established principles of federal Indian law that state that tribal-treaty and inherent-sovereign rights remain intact absent unequivocal expression of congressional intention to abrogate them. Furthermore, the panel's decision expands a split with the Tenth Circuit regarding the immediate question presented to the panel: whether the NLRA vests the Board with authority to regulate federally recognized Indian tribes. Second, enforcement of the panel's judgment pending the Tribe's petition would irreparably harm the Tribe by impairing the Tribe's exercise of its tribal-treaty and inherent-sovereign rights to self-govern and to exclude or condition entry by nonmembers and by impairing the Tribe's ability to secure revenue to fund government services for the public. The harm to the Tribe cannot be adequately remedied with monetary damages.

A. The Tribe's petition will present a substantial question regarding applicability of the NLRA to federally recognized Indian tribes.

The Tribe's petition for a writ of certiorari will present a substantial question for two reasons: (1) the panel's decision conflicts with Supreme Court precedent and established principles of federal Indian law; and (2) the panel's decision expanded the split between this Court and the Tenth Circuit as to whether the NLRA vests the Board with authority to regulate federally recognized Indian tribes.

1. The *Soaring Eagle* decision conflicts with Supreme Court precedent.

In this case, the panel applied a doctrine established by the United States Court of Appeals for the Ninth Circuit in *Donovan v. Coeur d'Alene Tribal Farm*,[14] and adopted by a separate panel of this Court three weeks earlier in *NLRB v. Little River Band of Ottawa Indians Tribal Government*.[15] The *Coeur d'Alene* doctrine directs that federal statutes (like the NLRA) that do not mention Indian tribes *always* apply to tribes except under three narrow circumstances.[16] But the *Coeur d'Alene* doctrine is "exactly 180-degrees backward."[17]

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[13] Fed. R. App. P. 41(d)(2); *accord* 6 Cir. R. 41(a).
[14] 751 F.2d 1113 (9th Cir. 1985).
[15] 788 F.3d 537 (6th Cir. 2015).
[16] *Id.* at 1115–16.
[17] *NLRB v. Little River Band of Ottawa Indians Tribal Government*, 788 F.3d 537, 565 (6th Cir. 2015) (McKeague, J., dissenting).

As the *Soaring Eagle* panel correctly stated in response to the *Little River* decision, "[t]he Supreme Court demands a clear statement of intent for the abrogation of Indian treaty rights."[18] The Supreme Court has long followed this rule.[19] Under this Supreme Court jurisprudence, a silent statute like the NLRA *cannot* divest tribes of treaty or inherent sovereign rights because it never mentions tribes in its text or legislative history, and "the proper inference from [congressional] silence" is that tribal sovereignty "remains intact."[20]

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[18] Slip op. 11 (citing *South Dakota v. Bourland*, 508 U.S. 679, 687 (1993); *United States v. Dion*, 476 U.S. 734, 739–40 (1986)).

[19] *See, e.g.*, *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 195 (1999) (where substantive federal law is silent, "to presume the existence of [federal] power would run counter to the principles that treaties are to be interpreted liberally in favor of the Indians, and treaty ambiguities to be resolved in their favor"); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear . . . congressional abrogation."); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979) ("Absent explicit statutory language, we have been extremely reluctant to find congressional abrogation of treaty rights, and there is no reason to do so here." (citation omitted)); *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976) (refusing to read an ambiguous federal statute to allow a state to tax on-reservation Indians); *Mattz v. Arnett*, 412 U.S. 481, 504–505 (1973) ("[W]e are not inclined to infer an intent to terminate [an Indian reservation] . . . . A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 412–13 (1968) ("We decline to construe the Termination Act as a backhanded way [of] abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists[,] the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress.") (quotation and citation omitted).

[20] *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148 n.14 (1982)).

The Supreme Court recently reaffirmed this longstanding rule in *Michigan v. Bay Mills Indian Community*.[21] It reiterated that "a fundamental commitment of Indian law is judicial respect for Congress's primary role in defining the contours of tribal sovereignty."[22] It relied on the "enduring principle of Indian law" that Congress must speak "clear[ly]" and must "unequivocally express" its intent to limit tribal sovereignty.[23] Indeed, in that suit, "where Congress had expressly abrogated tribal immunity from suit for illegal gaming on Indian lands, the Court refused to expand the abrogation to allow suit for illegal gaming outside Indian country, even though the resulting anomaly was arguably nonsensical."[24] The Supreme Court repeated that "unless and until Congress acts, the tribes retain their historic sovereign authority."[25]

Despite the Supreme Court's consistent jurisprudence, the panel in this case nevertheless held that, because it was bound by *Little River*, the silent NLRA applies to the Tribe and its on-reservation, trust-land Casino.[26] The panel acknowledged its departure from Supreme Court jurisprudence. It understood that although its preferred reasoning was "in accordance with the Supreme Court

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[21] 134 S. Ct. 2024 (2014).
[22] *Id.* at 2039.
[23] *Id.* at 2031–32.
[24] *Little River*, 788 F.3d at 563 (McKeague, J., dissenting) (describing *Bay Mills*, 134 S. Ct. at 2038).
[25] *Bay Mills*, 134 S. Ct. at 2031 (quotation omitted).
[26] *Soaring Eagle*, slip op. 34.

precedents[,]" its ruling was not.[27] But *Little River* had already adopted "a different way of construing congressional silence, a way that has never been approved by the Supreme Court or applied in any circuit to justify federal intrusion upon tribal sovereignty under the NLRA."[28] That "judicial remaking of the law . . . [wa]s authorized neither by Congress nor the Supreme Court."[29] As the *Soaring Eagle* panel recognized, the *Coeur d'Alene* doctrine it applied is exactly opposite "the analytical framework dictated by the Supreme Court for cases like [it]."[30] The conflict between the decision in this case and the bounty of Supreme Court precedent that should have controlled this case establishes a substantial question for Supreme Court review.

2. The *Soaring Eagle* decision widened a circuit split.

The *Soaring Eagle* decision also expanded a conflict between this Court and the Tenth Circuit regarding whether Congress afforded the Board the authority to regulate tribes. In an en banc decision from the only other appellate court to consider the question, the Tenth Circuit in *NLRB v. Pueblo of San Juan*[31] held that Congress *had not* granted the Board that authority. *San Juan* heeded the Supreme Court's admonition that "[w]here tribal sovereignty is at stake, . . . 'we tread

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[27] *Id.* at 27.
[28] *Little River*, 788 F.3d at 556 (McKeague, J., dissenting).
[29] *Id.* (McKeague, J., dissenting).
[30] *Soaring Eagle*, slip op. 17.
[31] 276 F.3d 1186 (10th Cir. 2002).

lightly in the absence of clear indications of legislative intent.'"[32] And it reiterated that it will only find divestiture of tribal sovereign authority "where Congress has manifested its clear and unambiguous intent to restrict tribal sovereign authority."[33] Accordingly, in *San Juan*, the Tenth Circuit noted that "[s]ilence is not sufficient to establish congressional intent to strip Indian tribes of their retained inherent authority to govern their own territory" and that "[t]he correct presumption is that silence does not work a divestiture of tribal power."[34] Ultimately, in the absence of a Congressional grant of authority to the Board, the Tenth Circuit refused to apply the NLRA to invalidate the tribe's conflicting labor laws.[35]

In *Little River*, a panel of this Court all but expressly rejected *San Juan*.[36] Instead, *Little River* held "that the Act applie[d]" to the tribe.[37] Likewise, in this case, the panel concluded that "the NLRA applies to the Soaring Eagle Casino and Resort, and that the Board has jurisdiction over the present dispute."[38] That decision was predicated solely on *Little River*, and stands as the second decision by this Court directly conflicting with the Tenth Circuit's decision in *San Juan*.

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[32] *Id.* at 1186, 1195 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 60 (1978)).
[33] *Id.* at 1194.
[34] *Id.* at 1196.
[35] *Id.* at 1200.
[36] *See generally Little River*, 788 F.3d 537.
[37] *Id.* at 556.
[38] Slip op. 34.

Thus, an irreconcilable conflict exists between the Tenth Circuit's decision that Congress *did not* grant the Board regulatory authority over tribe, and the *Soaring Eagle* adoption of *Little River*'s decision that Congress *did* grant that authority to the Board. The conflict has been recognized twice already, once by the dissent in *Little River,*[39] and again by the panel in this case.[40] The conflict raises a substantial question for Supreme Court consideration.[41]

B. There is good cause for a stay because the Tribe will suffer irreparable harm if the panel's judgment is enforced.

Good cause exists to stay issuance of the mandate. The Tribe's policy is a duly enacted tribal law, and its disciplinary actions enforced that tribal law. Through both enactment and enforcement, the Tribe exercised its tribal-treaty and inherent-sovereign rights to exclude nonmembers from its reservation or to condition their entry and to govern itself. Enforcement of the panel's judgment will significantly interfere with the Tribe's exercise of these tribal-treaty and inherent-sovereign rights. This interference would irreparably harm the Tribe.[42] Moreover,

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[39] *Id.* at 558–59, 560–61 (McKeague, J., dissenting).
[40] Slip op. 29–30.
[41] *See* Supreme Court Rule 10 (providing that "a United States court of appeals ha[ving] entered a decision in conflict with the decision of another United States court of appeals on the same important matter" is among the "character of reasons" considered by the Supreme Court when deciding whether to grant certiorari).
[42] *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (finding irreparable harm where "the prospect of significant interference with tribal self-government" existed (quotation omitted)); *cf. Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1473 (8th Cir. 1994) (finding irreparable harm where

Soaring Eagle Casino and Resort produces over 90% of the Tribe's revenue.[43] Application of the NLRA to the Tribe would, *inter alia*, allow workers to strike, choking off the Tribe's primary governmental revenue source. Thus, enforcement of the panel's judgment would imperil the Tribe's ability to secure revenue to fund its governmental services.[44] These harms to the Tribe will be irreparable because they cannot be adequately remedied with monetary damages[45] for two reasons. First, "harm to tribal self-government [is] not easily subject to valuation."[46] Second, the Board enjoys sovereign immunity from suit for retroactive monetary damages.[47] Because of the severe consequences of enforcing the panel's judgment and the lack of an adequate monetary remedy, staying issuance of the mandate is necessary to protect the Tribe until it petitions for a writ of certiorari.

"threatened disruption of electric services could . . . result in economic harm to the Tribe").

[43] Slip op. 4.

[44] *Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989) (finding irreparable harm where the tribe "would lose income used to support social services" and "lose jobs employing Indians").

[45] *See Prairie Band of Potawatomi*, 253 F.3d at 1250 ("Cases have . . . noted that irreparable harm is often suffered when the injury cannot be adequately atoned for in money . . . ." (quotation omitted)); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 525 (3d Cir. 1976) ("Irreparable injury is suffered where monetary damages are difficult to ascertain or are inadequate." (quotation omitted)).

[46] *Prairie Band of Potawatomi*, 253, F.3d at 1251.

[47] *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 146 n.4 (1971); *cf. Chaske*, 28 F.3d at 1469, 1473 (finding irreparable harm where "the Tribe would be unable to recover any damages . . . as [state regulatory commission] has Eleventh Amendment sovereign immunity in federal court in suits requesting money damages").

Conclusion

The Tribe's petition for a writ of certiorari will present substantial questions for the Supreme Court. Furthermore, good cause exists to stay issuance of the mandate. For these reasons, and in light of the Board's decision not to oppose this motion, the Tribe respectfully requests that this Court stay issuance of the mandate, pending the Tribe's timely petition.

Dated: October 2, 2015

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Certificate of Service

I certify that on October 2, 2015, I electronically filed the above motion with the Clerk of Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. All of the participants in the case are registered CM/ECF users, and will be served by the appellate CM/ECF system.

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